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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 248

VICTORIO NOGUEIRA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,379)

(34,379)

SUPREME COURT OF THE UNITED STATES

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[fol. a-1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L 41-311

VICTORIO NOGUEIRA, Plaintiff,

against

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Defendant

NOTICE OF APPEAL

SIRS: Please take notice that Victorio Nogueira, the plaintiff herein, hereby appeals to the United States Circuit — of Appeals, for the Second Circuit, at the next Term thereof, to be held at the Court House, Post Office Building, Borough of Manhattan, City of New York, from the judgment entered in the office of the Clerk of the Court on the 17th day of July, 1928, dismissing the plaintiff's complaint, and from each and every part, as well as the whole thereof.

Dated N. Y., July 25th, 1928.

Yours, etc., Sansone & Gelb, Attorneys for Plaintiff.
Office & P. O. address: No. 233 Broadway, Borough of Manhattan, New York City.

To John M. Gibbons, Esq., Attorney for Defendant, Room 3841, Grand Central Terminal, Borough of Manhattan, New York City; Alex Gilchrist, Jr., Clerk of the United States District Court, Southern District of New York.

[fol. 2] Summons, in usual form, omitted in printing.

[fol. 3] IN UNITED STATES DISTRICT COURT

COMPLAINT

Plaintiff herein through his attorneys, Sansone & Gelb, complaining of the defendant, alleges:

1. Upon information and belief that at all times hereinafter mentioned the defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and maintains an office and place of business in the City and State and Southern District of New York.

2. That at all times hereinafter mentioned the defendant owned, operated and controlled a certain system of railroad transportation and controlled a certain system of float and tug boat transportation, operating the same for the carrying of passengers and freight from and between the States of New York and Connecticut, and by reason thereof was engaged in what is commonly known as interstate commerce.

3. That at all times hereinafter mentioned plaintiff was employed by the defendant as a laborer and freight handler.

4. That heretofore and on or about the 13th day of October, 1927, plaintiff was employed as a laborer and freight handler at or near Pier 42 on a dock of the defendant company and on or near a float of the defendant company moored to said dock at Pier 42, East River, in the Borough of Manhattan, City and State of New York.

5. That at the time and place above mentioned plaintiff was engaged in loading and handling freight destined to [fol. 4] points outside of the State of New York and was assisting in the loading of such freight on to a float of the defendant company, which float contained freight destined to points outside the State of New York, and by reason of which fact was engaged in what is commonly known as interstate commerce.

6. That at all times herein mentioned there was and still is in full force and effect a general statute of the United States of America, being Chapter 149 of the Laws of 1908, as amended by Act of Congress approved April 5th, 1910 and known as "An Act Relating to Liability of Common Carriers by Railroad to their Employees in Certain Cases," which statute is binding upon the plaintiff and defendant herein.

7. That at the time and place above mentioned while the plaintiff was engaged in his duties as a freight handler and

while he was in the act of moving or loading a bale, bundle, parcel or piece of freight on to the float of the defendant company through the negligence and carelessness of the defendant, its agents, servants and employees, the said bale, bundle, parcel or piece of freight and the hand truck upon which the same was loaded, were caused to come in violent contact with the plaintiff's body, inflicting serious personal injuries upon him.

8. That the said accident and consequent injury to the plaintiff was brought about through the negligence and carelessness of the defendant, its agents, servants and employees in that they failed to provide plaintiff and his co-workers with adequate tools, appliances and equipment for the safe and proper conduct of the work then and there in hand; in that they conducted the work in a dangerous and improper manner; in that the method adopted for the work [fol. 5] was dangerous and unsafe in view of the surrounding circumstances; in that they failed to provide plaintiff with a sufficient number of competent and skilled co-workers for the safe conduct of the work then in hand; in that they failed to properly instruct the plaintiff and his co-workers as to the safe and proper method in which the work should have been safely conducted; in that they had in charge of the work a foreman or supervisor who was unskilled in the direction of the work then in hand; in that they failed to promulgate and enforce suitable and proper rules and regulations governing the work then in hand to the end that the accident such as occurred could have been avoided; and in that they failed to provide the plaintiff with a reasonably safe place in which to work; and in that plaintiff's co-workers who were engaged in assisting him in the moving of the bale, bundle, parcel or piece of freight failed to exercise due care and regard for the safety of the plaintiff, and conducted themselves in a reckless and careless manner in the handling of the said bale, bundle, piece or parcel of freight at the time and place of the accident.

9. That said accident and consequent injury to the plaintiff was occasioned wholly and solely by reason of the negligence of the defendant.

10. That by reason of said accident plaintiff was caused to be made sick, sore, lame and disabled; he received serious

injuries to his head, arms, legs and body; he received a severe shock to his nervous system and was caused to suffer great pain and mental anguish; that he has been, and in the future will be required to undergo medical treatment in an effort to be cured of or lessen the effects of his injuries; that he has been and in the future will be prevented from [fol. 6] attending to his usual occupation from which he derived a livelihood, and that all of said injuries are, as plaintiff is informed and verily believes, of a permanent nature.

11. That by reason of the premises plaintiff has been damaged in the sum of Twenty Thousand ($20,000) Dollars.

Wherefore plaintiff demands judgment against the defendant in the sum of Twenty Thousand ($20,000) Dollars, besides the costs and disbursements of this action.

Sansone & Gelb, Attorneys for Plaintiff. Office & P. O. address: 233 Broadway, Borough of Manhattan, New York City.

Duly sworn to by Victorio Nogueira. Jurat omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER

The defendant above named, by its attorney, John M. Gibbons, for it answer to the complaint herein:

First. Admits that at all times hereinafter mentioned the defendant owned, operated and controlled a certain system of railroad transportation and controlled a certain system of float and tugboat transportation, as alleged in paragraph designated "2" of the complaint herein; and denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the other allegations contained in said paragraph designated "2" of the complaint herein.

Second: Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs designated "5," "6" and "10" of the complaint herein.

Third. Denies upon information and belief, each and every allegation contained in paragraphs designated "7," "8," "9" and "11" of the complaint herein.

For a separate answer and defense, the defendant alleges, upon information and belief:

First. That whatever injuries the plaintiff may have received at the time and place mentioned in the complaint [fol. 8] herein resulted from his failure to exercise due care and diligence in the performance of his duties, his own negligence and carelessnes contributing thereto.

For a second separate answer and defense, the defendant alleges, upon information and belief:

First. That whatever damages or injuries the plaintiff sustained at the time and place mentioned in the complaint herein were sustained while he was at work in an employment which he entered knowing the risk thereof, and assumed the same by entering into and continuing said employment.

Wherefore the defendant demands judgment dismissing the complaint herein, with costs.

John M. Gibbons, Attorney for Defendant. Office and Post Office address: Room 3841, Grand Central Terminal, New York City.

Duly sworn to by Frank E. Hall. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF PARTICULARS

Plaintiff submits the following as and for his Bill of Particulars herein:

1. Plaintiff received fractures of the upper and outer end of the right tibia, the line of fracture extending to the knee joint, and a fracture of the upper end of the right fibula about two inches from the tip with considerable deformity at the site of fracture. Also an oblique fracture

at the junction of the upper and middle third of the tibia with marked overlapping and external angulation, resulting in marked swelling and thickening about the knee joint with loss in flexion. Also marked visible external bowing at the site of fracture; as a result of these fractures, plain-
[fol. 10] tiff's right leg is one and one-half inches shorter than the left leg. The right angle is swollen and restricted in motion. That as a result of these injuries plaintiff has suffered and is suffering pain in his leg; is prevented from having the free use thereof because of the stiffness in the leg, knee and ankle.

2. All the injuries above set forth are permanent in nature.

3. Plaintiff has not yet received a bill for medical care and for medicines and is unable at this time to give the amount thereof.

4. Plaintiff was confined to a hospital from the date of the accident, namely October 13th, 1927 to December 7th, 1927. He was thereafter confined to his bed at home until November 29th, 1927 and subsequently confined to his home for a period of approximately four weeks.

5. Plaintiff was employed as a freight laborer or freight handler and has been prevented from attending to his occupation since the date of the accident. That his average weekly earnings were $27.00.

6. The negligence of the defendant consisted of the following: The fellow servants of the plaintiff who assisted him in loading the bale, bundle or piece of freight on to the float of the defendant company failed to hold on to the said bale while the same was being moved on a truck which the plaintiff was handling, and carelessly permitted the bale of freight together with the truck, to get out of their control and to fall upon the plaintiff's leg. They let go of the said piece of freight without warning the plaintiff that they were doing so and caused the same to strike him without giving him an opportunity to reach a position of safety. The defendant was further negligent in that it failed to supply the plaintiff with suitable and adequate
[fol. 11] equipment by the use of which the draft being

handled at the time of the accident could have been moved with safety. Defendant was further negligent in that it adopted and pursued a dangerous and unsafe method of moving freight such as was being moved at the time of the accident. Defendant was further negligent in that it failed to adequately supervise the work then and there being done and in that it supplied a foreman or supervisor in charge of the work wholly unsuited and unfit for the work then and there being done.

7. The information herein sought has heretofore been given.

8. The information herein sought has heretofore been given.

9. No claim made in this regard.

10. The place furnished the plaintiff was rendered unsafe by reason of the negligence of the defendant as alleged in paragraph 6 above.

11. The fellow servants of the plaintiff improperly handled the bale or piece of freight; they conducted themselves in an imprudent manner and paid no attention to the safety of the plaintiff while they were assisting him in the movement of the piece of freight; they permitted the said bundle or piece of freight to get out of their control and to come in violent contact with the plaintiff.

12. The information herein sought has heretofore been given.

Sansone & Gelb, Attorneys for Plaintiff. Office & P. O. address: 233 Broadway, Borough of Manhattan, New York City.

[fol. 12] *Duly sworn to by Victorio Nogueira. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

JUDGMENT

The issues in this action having been brought on for trial before Hon. Walter C. Lindley and a jury at a Stated

Term of this Court on the 11th day of July, 1928, at the Court Rooms thereof, in the Post Office Building, New York City; and plaintiff and defendant having appeared by counsel, and the allegations and proof on the part of the plaintiff having been heard and considered; and the Court having dismissed the complaint at the end of the plaintiff's case; and the costs of the defendant, The New York, New Haven and Hartford Railroad Company, having been taxed at the sum of Thirty Dollars ($30-00/100);

Now, on motion of John M. Gibbons, attorney for the defendant, The New York, New Haven and Hartford Railroad Company, it is

Ordered, ajdudged and decreed that the defendant, The New York, New Haven and Hartford Railroad Company, have judgment against the plaintiff, Victorio Nogueira, in amount of Thirty Dollars ($30-00/100), costs as taxed herein, and that the defendant, The New York, New Haven and Hartford Railroad Company, have execution therefor.

Dated New York, July 17th, 1928.

Alex Gilchrist, Jr., Clerk.

[fol. 14] In United States District Court, Southern District of New York

Before Hon. Walter C. Lindley, J., and a Jury

Case

New York, July 11, 1928.

Appearances of Counsel

Sansone & Gelb, Attorneys for Plaintiff, by Anthony Sansone, of Counsel.

John M. Gibbons, Attorney for Defendant, by E. R. Brumley, of Counsel.

A jury was impaneled and sworn.

Opening for Plaintiff

Mr. Sansone: May it please the Court, gentlemen of the jury: As stated to you by his Honor, this is an action

brought by Mr. Nogueira against the New York, New Haven & Hartford Railroad to recover damages which he sustained while in its employ. This accident occurred on the 13th day of October, 1927, and it occurred at Pier 42, East River. At the time of this accident the plaintiff was a member of a gang of men whose job it was to handle freight upon the docks and move it from the docks to the floats; you have all seen these car floats at some time or other. The floats come right in and the cars stay on the float and this man, and the rest of his gang, were engaged in getting freight from the dock to the cars. Upon this occasion they were engaged in loading merchandise which consisted of bales of paper, bales of paper which were consigned from [fol. 15] the State of New York to the State of Connecticut. The defendant was engaged in doing this kind of work which is called interstate commerce. Being engaged in that kind of work, we claim that he is entitled to the provisions of the Federal Employers' Liability Act. That act covers the duties and responsibilities of a railroad company who is engaged in working and carrying of interstate commerce, the handling of freight going out of the State. That act covers the duties and responsibilities of a railroad company toward the men who are engaged in working in interstate commerce. I mention that at this time because under the provisions of that act the duties and responsibilities of a railroad company towards its employees such as this man, are considerable, and they are far different than they were under the old law before that was passed, and in that connection I am going to ask you particularly not to form any opinion as to the law, or who is at fault, because under the common law as you will know, if the man is careless himself there could be no recovery if he was hurt there through carelessness, on the part of one of the other men working there, there could be no recovery, the only grounds that he could recover on is a defective place or unsafe place to work, so I will ask you to wait until you hear his Honor's charge upon it before you pass upon the facts.

Now on the day of the accident they were loading bales of paper, weighing something over a thousand to twelve hundred pounds, and in order to get that paper on the float they use these ordinary handtrucks. You have all seen them. Some of the men were working on the dock and

some of the men were working on the floats, waiting for [fol. 16] this cargo to be brought over, and then these men on the floats would store it inside the freight cars.

The morning that this man and his gang went to work they were on a different pier and working there until about four o'clock, I think they were on Pier 37 or 38, I am not sure, but I think that is what it was, but about four o'clock they went to Pier 42, it seems that the gang that had been working at that pier had quit earlier than is usual, at least they quit earlier than this other gang. They were ordered, when they got there, to this Pier 42, to start loading these bales of paper. At the time that they got there, at the time that this accident happened, the tide was pretty near low, nearly all the way down I believe, and with the tide in that condition the place of the float where they ran off the bales is quite, or was quite a bit below the dock on which these bales of paper were stored, and in order to get from the dock down to the float, they had a plank, approximately five or six feet wide, and about, I should say, ten feet long. I think the testimony will be that at the time of this accident that the part of the float to which this plank was raised was some four and one half to five feet lower than the dock on which the paper was stored, with the result that it became necessary to take these 1,200-pound bales of paper down, down that 10-foot plank at an angle of something like four and a half or five feet.

Now the work was supposed to be carried on under the usual practice, and the practice had been and was on this day that when they had the condition of a low tide, and a heavy load, such as they had on this day, that the man who is handling the handtruck, such as this plaintiff was, on this day, that he was to have some help. Of course that [fol. 17] was quite a big drop. If it had not been such an angle, if it had been nearly level, or level, he could have handled it alone, or if there was just a little bit of a drop, several inches, that might be a little help to him, but it had been the practice, and a reasonable and precautionary one that with the tide in the condition that it was on this day, low, that the man who had a heavy load to handle, these 1,200-pound bales of paper, that that man was to have help in getting it down, he was to have help holding that back, holding it back so that it would not push him right off the float, and run over him, because it was physically im-

possible for one man to handle it while the tide was in that condition. Of course, under other conditions probably he could, but with the conditions as they were on that day he could not.

Just before they went down the plank, they would stop right at the top before they started down. This man did just that on the day of the accident. They got there around four o'clock or a little after and this bale was the first one to go down. The first one he took down, so when he got to the head of that plank he called to the men telling them that he was ready to go down, and the men came, I think two men came to him, and a couple more from the dock, and they were supposed to hold it back, they were supposed to hold it back, you know they had these big freight hooks and they hook them into the bales of paper. They yanked right into it, deep in it to make sure that they have something that will hold, they were handling paper you know, and so these men came over to help him with this load. These men were to get their hooks into the big bale and hold it back, and [fol. 18] that was their duty to hold it back, so he started to go down. It seemed that with the tide in that condition this plank that came up just projected up a little from the top, with the result that in order to make the space smooth, they had a great big piece of steel or iron and they would bring it up. Well, anyway, he started down and just about the time that he started down it pushed him right down, nobody seemed to be holding it back. After it pushed him down, first started down, the front handles he was holding came up, with the result that it pushed him right down, and finally pushed him down to the float, with the load on the handtruck overturning and both of them hitting him. It fractured his leg in two places, I think. The doctor will tell us about that. I do not think that it would be proper for me to spend any time on that now. While he was lying down there were the men who were supposed to be holding the load back with their big freight hooks, there they were with their hooks in hands on the dock, and as a matter of fact if they had been where they were supposed to be they would still be hanging right on to the paper, but the men were on the dock with the hooks in their hands, that is where they were.

We say that it was negligence on the part of these men as they were supposed to help him under the circumstances

under which this merchandise was being loaded, and they were supposed to help him under the usual circumstances that he was entitled to.

We say that this work was conducted in such a manner that when this man started down with a big load of 1,200 pounds on his handtruck, going down a plank which dropped five feet, that they should have adopted some method by [fol. 19] which that work would have been done with some degree of safety. We say that under the circumstances this railroad company is responsible for this man's injuries.

As a result of this accident, gentlemen, he was taken to a hospital. He was there for two days, and then they transferred him to another hospital where he was for a period of some weeks, just how long I do not remember, the plaintiff will tell you how long he was there. They put on a plaster cast which was on him for eight weeks I think. He was laid up for a considerable time after that, and as a result of the accident he has a shortening of the leg something like an inch and a half which causes him to walk with a limp, which will of necessity be permanent. However, we will let the plaintiff tell you about that.

Since the accident he has attempted to do a little work. He got light jobs to do, just trying to do the best that he could, but he has not been able to do his regular longshoreman work, handling 1,200-pound bales of paper. The leg is weak. Just how long it will be in that condition the doctors will have to tell you. Now he goes along with a limp, true, but he gets along nevertheless, but there is one thing, gentlemen, that leg which has shortened swells up when he walks on it. When he puts his weight on it to any degree or to any extent.

That briefly, gentlemen of the jury, is an outline of what we expect to prove to you for which we are going to ask you for your verdict. I thank you for your attention.

Mr. Brumley: If your Honor please, on the plaintiff's bill of particulars, and in the opening statement of counsel I want to move to dismiss this action on the ground that it [fol. 20] appears that this Court has not got the jurisdiction, and on the ground that it appears that the United States Longshoremen's & Harbor Workers' Compensation Commission applies to this kind of a case and is exclusive, and that the Federal Employers' Liability Act, under which

this action purports to be brought, does not apply. Also on the ground that the plaintiff had brought the wrong remedy and that the Court has not the jurisdiction of the subject matter.

The Court: I will not determine that question at this time. I will let him introduce his evidence. I want to hear what he has to say. The motion is denied.

Mr. Brumley: Exception.

The Court: I will give you a chance to present that again.

Mr. Brumley: Thank you, your Honor.

Mr. Sansone: If your Honor please, the defendant in its answer denies interstate commerce, but I think that this time they will admit that the bales of paper were consigned at this time to a point out of the state, at the time of this accident, and that the plaintiff was engaged in interstate commerce.

Mr. Brumley: The defendant admits that the bales being transported by the plaintiff was destined from New York to Connecticut.

At this time, your Honor, with your permission, I will open to the jury.

Opening for Defendant

Mr. Brumley: May it please the Court and gentlemen of the jury. I am going to be very brief, because Mr. Sansone has told you in substance the whole story. A lot of testimony will be shown that will not be disputed. For in-
[fol. 21] stance, there is no question but that this man was engaged by the New York, New Haven & Hartford Railroad Company, or that he was engaged in trucking a bale of paper, weighing about 1,100 or 1,200 pounds, from the dock, Pier 42, East River, to a car float, a railroad car which was on a float lying in the river. There is no question about that, nor is there any question but that he sustained the injuries.

There is not a very moot question as to the extent of his injuries or as to the period of his disability. That of course you will hear from the doctor, I am not going to review that part at all. I am not going to review any of the proof that we are going to give you on the man's disability.

There is going to be a dispute as to how the accident happened and why it happened. Now it has been said that the practice was under these conditions to furnish men to assist in trucking the bales down from the dock to the boat, and it was admitted, and we will prove it, that we did furnish additional help. We will prove to you that it was not the practice to do that; that the men themselves under these conditions practiced that in trucking that freight down alone. We will also show you, we believe, that under these same conditions the men trucked it down alone. Mr. Sansone did not tell you that there was a sort of a brake, and that that brake was used to assist him in taking down the truck and slowing it and guiding it. That was better than human help could be.

There were two men with hooks on the rear of the truck holding it and balancing it, holding the bales. There was no mention to you of the man who was standing right alongside of the plaintiff himself, assisting in holding the handles. [fol. 22] It was this man's job to take this truck down with the bale and at the top, he caught hold of the two handles and held on with his two hands.

Now as I understand it there was another man furnished to him who had ahold one of the handles. Back of him were two other men with bale hooks who had ahold of this bale. Now we will show you that prior to the accident on this day there were a number of bales trucked down the plank, when the tide was low, by one man, but instead of asking the plaintiff to do it alone, we came there with additional men to assist him.

Two men who had a hold with bale hooks, they did not stay at the top of the plank. They started down the plank, and the accident did not start to happen until they got half way down the plank, and then, for some reason, the plaintiff lifted up the handles, instead of holding them down, and they went up; and therefore he lost control, and then he entirely let go of the handles and the man to the right tried to hold it with one hand. Naturally under those conditions, the truck swerved over to the left. The man in the back had a hold of the bundle of paper. But, however, finally the bundle went down the plank out of control of everybody and the plaintiff himself preceded the truck and the bundle down the plank, and landed on the deck of the

float and then the truck and the bale came down and struck him causing a fracture of his leg.

Now we say that we will show that to you. We can't see where there was any failure on our part to furnish help or assistance. We will put on witnesses who assisted this man and you will find out whether they were negligent. It was an accident, gentlemen, pure and simple, and under the law it is our opinion that the defendant is not liable. That [fol. 23] was the kind of a risk that all of us assume in everything that we do in life. It was an obvious risk, an open risk, and if that be so, the defendant railroad company is not at fault. In order to hold the railroad company, you must find some angle of negligence or failure on the part of the railroad company, but anything that is assumed by the plaintiff, anything that is purely accidental, the railroad company should not be asked to pay for it. Now, this man worked in and about a dock on planks and car floats and on cars and on floats. You and I perhaps, gentlemen, working at desk work do not run into conditions such as he did, but it was in the regular line of his employment. It was dangerous, inherently so, accidents do happen and it was not the fault of anybody, and we say that this is that kind of a case, we say this is that kind of an accident. We will give you the evidence and we will ask you that unless you find that the defendant was at fault, and that the plaintiff did not assume the danger, to bring in a verdict for the defendant.

Gentlemen, I thank you for your attention.

Victorio Nogueira, the plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Sansone:

Mr. Sansone: If the Court please, this witness speaks very little English. I will have to use an interpreter for him. I attempted to get the Spanish Consul to furnish one. There is a man in the court room now that will interpret for us, with your Honor's permission.

[fol. 24] The Court: Can't the witness speak English?

Mr. Sansone: Very little. We cannot use him, your Honor, without an interpreter.

The Court: Very well; get the interpreter.

(At this time Anthony Sanchez was called and sworn to act as official interpreter.)

Q. Now, talk up, will you, please. Mr. Nogueira, you are the plaintiff—you are suing the railroad company in this case?

A. Yes, sir.

Q. How old are you, Mr. Nogueira?

A. Forty-three years of age.

Q. How long have you been in this country?

A. Eleven years.

Q. In October of 1927 were you working for the New York, New Haven & Hartford Railroad Company?

A. Yes, sir, I was.

Q. How long had you worked for the New York, New Haven & Hartford Railroad Company before that?

A. I had been working for them for about three years, at times.

Q. Did you work these three years steady or did you work some of the time and then stop and then go back to work for them?

A. I had been working for the company. Only when there is no work I look for another job and then I go back to the company again.

Q. At the time of this accident you were working on the dock, were you?

A. Yes, sir, on the dock.

Q. How long had you been working on the docks before the accident?

A. Two weeks.

Q. On the morning of the accident you were working at what pier?

A. Pier 37—38.

[fol. 25] Q. What time did you start to work there?

A. Eight o'clock in the morning.

Q. When did you leave Pier 37-38, what time of the day?

A. I left there in the afternoon.

Q. I asked you what time of the day, what time in the afternoon did you leave?

A. Between a quarter after four and half past four o'clock.

Q. Do you recall what kind of work you were doing at Pier 37—38?

A. What kind of work?

Q. Yes, what were you loading there?

A. I was working on railroad cars.

Q. What were you doing on the railroad cars?

A. Filling up the railroad cars.

Q. Filling up the railroad cars?

A. Yes, sir, I was working on the railroad cars.

Q. Storing cargo or freight that some of the other men brought there?

A. I was working there storing freight, yes, sir.

Q. Were you working there with other men?

A. Yes, sir; one man would bring it in——

Q. The other man would bring the freight into the cars, and in the interim you stored it away?

A. The machines bring them alongside the car and then we put them into the car.

Q. How many men were working in your gang at Pier 37—38?

A. It depends, six or seven on that day.

Q. Now, for the two weeks that you had worked prior to the accident, for the railroad company, had you worked around these same piers, 37—38 and 42?

A. Yes, sir, on the same dock.

Q. And before the two weeks, and during the three years that you worked for the company, had you worked around these same piers?

A. At different piers, Pier 42, 37, 38—all of them.

Q. You had been working on piers for the company right along the East River?

[fol. 26] A. Yes, sir, for the whole time on the East River on the company docks.

Q. During the two years had you worked loading floats, and on the dock too?

A. Yes, sir, sometimes on a float, sometimes on a dock.

Q. Depending on where you were employed by the for-man; is that right?

A. Sometimes the for-man put me on a dock and sometimes on a float. Yes, sir, sometimes on the dock with the cars and sometimes without the cars.

Q. I suppose that during that time sometimes you worked there when the tide was high and sometimes you worked there when the tide was low, is that right?

A. Yes, sir.

Q. And you observed and saw how the work was done during that time?

A. Yes, sir, I did.

Q. You say that around between a quarter after and four-thirty, on the day of the accident, you went from Pier 38 to Pier 42, is that right?

A. About that time I went from 38 to 42.

Q. Did your whole gang go over to Pier 42?

A. Yes, sir.

Q. How many men were you having in your gang when you got to Pier 42?

A. Seven men.

Q. You say that there were seven men in your gang when you went over to Pier 42?

A. Yes, sir, there was.

Q. All came with you from Pier 37—38?

A. Yes, sir.

Q. Did you have a for-man in your gang?

A. Yes, sir.

Q. Do you know what his name was?

A. No, sir.

Q. Did he take the gang over to the other pier, Pier 42?

A. Just what do you mean?

Q. Did the for-man take the gang over, did you all go over with the for-man to Pier 42?

A. Yes, sir.

[fol. 27] Q. Now when you got over to Pier 42 were there any men working on the pier?

A. There was a gang there at that time, but they were going out when we got to 42.

Q. The other gang was coming out at that time?

A. Yes, sir.

Q. Well, did they wait until you came and then go away or did they go away before?

A. I saw the other gang go out when we got in to Pier 42.

Q. Well, now, when you got to Pier 42, was there any freight there to be loaded on the float?

A. There was a big truck loaded with bales of paper, big bales of paper.

Q. Was the truck right on the pier?

A. Yes, sir, right on the pier.

Q. How far from the float where they were going to take this material, were the bales?

A. Between 15 and 20 feet away (indicating.)

Q. Is that 15 or 20 feet to the plank that goes to the float?

A. Yes, sir, it is.

Q. Now, just what kind of freight was it?

A. Paper.

Q. Bales of paper?

A. Bales of paper.

Q. Did you notice how big those bales were?

A. Between five and six feet long.

Q. Between five and six feet long?

A. Yes, sir.

Q. Do you know about how wide they were?

A. They were about four or five feet, around that, wide.

Q. About how thick were they; do you know?

A. About that wide (indicating). They were about from here to the clerk's desk.

Mr. Sansone: You don't mean the clerk's desk, you mean where the judge is sitting.

The Witness: Yes.

[fol. 28] Mr. Sansone: I concede that that is about three feet six, is that right, Mr. Brumley?

Mr. Brumley: That is about three feet, yes. We will concede that.

Q. Do you know how much those bales weighed that you handled that day,

A. About 13,000 pounds—I mean 1,300 pounds.

Q. Had you handled that kind of paper before?

A. Before that date?

Q. Yes.

A. Yes, sir.

Q. Will you tell us how do you get the bales from the dock to the float? How do they get it on there?

A. How do they get them on?

Q. Yes, what do they have for that?

A. Two men put them on a hand truck.

Q. I am not getting to that yet. How do they get from the dock down to the float?

A. From the dock down to the float?

Q. Yes, do they have a plank?

A. There was a plank there but very low.

Q. How big was that plank, how wide?

A. About as long as that table (indicating).

Q. I mean going from the dock down to the float?

A. As I said, about as long as this, from where I am sitting over there.

Q. From where you are sitting, from where?

A. As long as that table, about.

Q. How long do you say the plank was?

A. About as long as that table (indicating counsel table.)

Q. From where you are sitting?

A. No, as long as that table, the plank is.

Q. You mean the plank was like the table, it was about the same width and about the same length?

A. Yes, just a little bit wider.

Q. How much wider, show us with your hands?

A. About like this (indicating).

[fol. 29] Q. Was it that much wide?

A. About like this (indicating).

Mr. Sansone: Do you concede that now to be about five and a half feet wide and about twelve feet long, as to the length of the plank?

Mr. Brumley: Yes.

Q. What was that plank made of, wood or what?

A. Wood.

Q. Heavy wooden plank was it?

A. Heavy wood, yes.

Q. Now on the sides of that,—was there anything on the sides of that plank?

A. Nothing on the side.

Q. Right on the top of the plank was there anything as it goes down?

A. Nothing.

Q. Were the rails up high or low?

A. It was all the way down.

Q. Were there any rails along the side of this plank?

A. No rails at all.

Q. At the time you got there will you tell us how much lower the part of the plank that was on the float was from the part of the plank that was on the dock?

A. About four or five feet.

Q. The tide was down, was it?

A. The tide was down, yes.

Q. And the flat was about four to five feet lower than the dock?

A. It was about five feet lower down to the dock.

Q. You mean above the dock?

A. Yes.

Q. Now when you got to Pier 42, what instructions did you get?

A. What instructions,—what do you mean?

Q. What did the foreman tell you?

A. The foreman told us to get one of the hand trucks and [fol. 30] to get the bales of paper out of there and take it to the float.

Q. And that truck is the usual hand truck with two wheels and handles?

A. Two wheels and two handles.

Q. Well, what were you instructed to do?

A. What?

Q. What were you instructed to do. Were you to have the truck that day?

A. No, I was to have no truck.

Q. At the time just before the accident when they got to Pier 42, were you told to take the truck?

A. Yes, sir.

Q. How many more of those men were told to take trucks?

A. Two men, two more men besides me.

Q. Now, did you put the bale of paper on the truck that day?

A. Yes, sir.

Q. Do you say you put the bale of paper on?

A. Well, the two men was putting the bales of paper——

Q. Did you put the bale of paper on the truck that day, and if so, how did you put it on?

A. Two men was putting the bales of paper into the truck.

Q. Well, now, had you taken any paper down on that float before the time that the bale that you were taking down when you got hurt?

A. Yes, some other day, but not that day.

Q. I am talking now about the day that you got there about a quarter after four.

A. No.

Q. You did not take any paper down before the accident?

A. No, sir.

Q. You are sure of that?

A. Yes.

Q. Did any one of the men working there at that time, when you went over at the pier at a quarter after four, did [fol. 31] any of them take any paper down?

A. No, sir; I was the first one.

Q. You are quite sure about that, are you?

A. Yes.

Q. When you got there, went over to start work, no one of your gang from down in Pier 37—38, that went over with you,—no one in your gang brought down any paper before you brought the first one down?

A. From my gang?

Q. Yes.

A. No, sir, I was the first one that tried to take it down.

Q. Of course, you had taken paper down there on other days before this?

A. When the tide was low like this?

Q. I asked you on other days had you taken this paper down?

A. Not all alone.

The Court: On days before this day when he was working there, did he take paper down.

The Witness: When the tide is high I used to take it but when the tide is low like it was that day, I never took it alone.

Q. What was that?

A. I say that when the tide was high I used to take it down, when it was low like it was that day that I got hurt, I never took it alone.

Q. What I am getting at is on days before the accident whether you took paper down alone there?

A. I used to take it down, me and two more men.

Q. Well, after these two men put this bale of paper on the truck, what did you do with the bale?

A. I took it alongside to the plank, and there I stopped.

Q. What did you do when you got alongside the plank?

A. What did I do.

[fol. 32] Q. Yes, what did you do when you got alongside the plank, what did you do with the bale?

A. I called to a fellow there in my gang to help me out.

Q. Did you hold the bale up in your hand or did you put it down?

A. What?

Q. Did you put it down or what?

A. I put it down.

Q. Well, after you called to some man to help you did some man come there?

A. Yes, some men came there and they moved the bale of paper—the men that came to help me. They moved the paper.

Q. I do not understand you, how many men came there?

A. Six and myself.

Q. Six other men came there?

A. There were six men altogether.

Q. That includes you?

A. Yes, sir.

Q. Six men altogether?

A. Yes.

Q. Now what did those men do when they came there?

A. They put the bale of paper up on the truck.

Q. Yes.

A. And they stuck the hooks into the bale of paper but they did not stick them in good. They left me alone to go down.

Q. Did you see them put the hooks into the paper, yes or no?

A. Yes, they put the hooks up.

Q. Now, after they hooked the paper, did you lift your truck, the handles?

A. When they put the hooks in, me and another man lifted up the truck.

Q. And when you lifted the truck was the bale in the back of you and you were going down straight?

A. I do not understand.

Q. All that I want to get at now is when you started down there were you in front of the bale, or was the bale in front of you?

A. I was ahead of the bale.
Q. You had two hands on the handles?
A. I was holding with two hands to the handles.

[fol. 33] Mr. Brumley: I think that we are going into rather leading questions.

Mr. Sansone: I am only trying to make it easy for everybody. It is hard for the man to understand.

Q. Were the men that had the hooks in the bale in front of you or in back of you?
A. In back of me.
Q. Well, after you lifted the handles, will you tell us just what happened?
A. They took hold and pushed down the truck so when the truck started to go down they lifted up the hooks and I do not know what happened, so I go down and the bale of paper goes onto me.
Q. Now after you lifted the handles and you started to go down, down the plank, did the truck come slow or fast from behind you?
A. It came very slow at first, but the plank was so deep down that the truck starts going fast and it goes down and it goes on to me.
Q. When the truck started to go fast what happened to you?
A. What happened to me?
Q. Yes, what happened to the handles or what happened to your hands that were holding the handles?
A. I was still holding on to the handles until the truck got down, and when the truck got down on the float it comes right on me, right on my leg.
Q. Did you hold up the handles until you got down to the float or did you hold all the way down the plank, or did you let go on the plank?
A. They left the truck go down. I went down with the truck; it go altogether down.
Q. Were you still walking down with it when you got to the float?
A. I could not get up when I got to the float, I fell down and I could not get up.

[fol. 34] The Court: Did you ever let go of the handles?
The Witness: I fell down with the car.

The Court: I asked you did you ever let go of the handles?

The Witness: No, sir, I could not open my hands.

Q. Do you remember when you started from the top of the plank to go down?

A. When I started to go down the truck come up like this (indicating) and so I could not open my hands and I had to go down with the truck.

Q. How far down the plank did you go when the handles were up straight like you showed us?

A. About three or four feet.

Q. Now, let us try and get it straight. You started and had the handles in your hands walking down, is that right?

A. Yes, sir.

Q. And you say that after you went two or three feet the handles straightened up?

A. Yes, sir.

Q. At the time that the handles straightened up was the truck going down slow or was it going down fast?

A. The truck was going fast and started to go straight and then it turned around and it went that way (indicating).

Q. What did you do when the handles went up straight?

A. I could do nothing.

Q. Did you still hold on the handles as it went down these other six or seven feet?

A. I just went with the truck.

Q. You went down together with the truck?

A. Yes, sir, altogether, up.

Q. Well, when you got down there did you see where these men were that were helping you when you started?

A. I saw some of them on the plank.

Q. Where? Near the top or the bottom of the plank?

A. Up on top of the plank.

[fol. 35] How close to the dock were they?

A. They were right alongside of the dock on the plank right alongside of the dock.

Q. That is, they were where you started from?

A. That was still in the same place yes, sir.

Q. What happened to you when the truck and the bale went down with the handles up as you have told us?

A. The truck and the bale and everything fell on my leg and I could not get up.

Q. Just where did it hit you, what part of your leg——

A. It hit me right here (indicating about the knee).

Q. What part of your leg did it go on?

A. Right here (indicating below the right knee).

Q. What was on your leg, the paper bale or the truck?

A. The truck was on top of the leg, and the bale was right where the car was going.

Q. The truck that you brought down was on top of your leg, is that right?

A. Yes.

Q. Well, now, about the rail?

A. The rail was under my leg.

Q. So that the truck was on top of your leg and the rails on which the cars go were underneath the leg, is that right?

A. Yes, sir.

Q. Where was the bale of paper?

A. The truck and the bale was on top of my leg, both legs.

Q. Do you know how much the truck weighed?

A. I don't know; I cannot figure it out.

Q. It is made of pretty heavy wood, isn't it?

A. Yes, sir.

Q. Good and strong?

A. Oh, I should say it was pretty near three hundred pounds, the truck.

Q. Now, on the other occasion when you worked there you say the men took those bales of paper down with a man walking in back with the hook; is that right?

Mr. Brumley: I object to the question as leading.

The Court: Objection sustained.

[fol. 36] Q. Now, will you tell us, Mr. Nogueira, on other times, before the accident, how they used to take the bales down when they had these heavy bales weighing 1300 pounds?

A. We used to take them down.

Q. I mean, but when the tide was low like it was that day?

A. Well, then they used to get four or five men, that is when we took a big bale like that one, and when the tide was low, we used to get four or five men to do it.

Q. Well, how would they hold it back?

A. They would go two ahead of the truck and four behind and put their hooks in the bale of paper and pull it back all the time to let it go down easy.

Q. Other times when they put in hooks good like you say, they held it back and let it go down easy, is that right?

Mr. Brumley: I object to that question.

The Court: Objection sustained.

Mr. Sansone: Exception.

Q. Well, how did the bales go down on the other days before the accident when, as you say, they put hooks in good?

A. Well, they hook the hooks good and then it goes down easy.

Q. And when they go easy, do the handles come up or do the handles stay the way you hold them, when they start?

A. They go about like this (indicating about the waist).

Q. After the accident where did they take you?

A. They took me to Pier 42 and from there to the hospital.

Q. They first took you to the Jewish Hospital?

A. To the Jewish Hospital, yes, sir.

Q. And you stayed there how many days?

A. Two days.

Q. And after that they took you from there, did they?

A. Yes, sir.

[fol. 37] Q. Now where did they take you?

A. Where?

Q. Yes, did they take you to any other hospital?

A. Yes.

Q. Where?

A. They took me to the Columbus Hospital.

Q. What did they do to you at the Columbus Hospital?

A. They put me in bed.

Q. I know, but what did they do to your leg?

A. They put a cast on it.

Q. A plaster cast?

A. Yes.

Q. What kind of a plaster cast? A hard cast?

A. A plaster cast, yes, sir.

Q. How long was the cast of plaster on, how many weeks did it stay on?

A. I do not know exactly, but about eight weeks.

Q. Eight weeks?

A. Yes, sir.

Q. Now, how did the leg feel before you went to the hospital and while you were in the hospital?

A. It hurt.

Q. I know that, but how did it feel before you went to the hospital and while you were in the hospital as to whether or not you had any pain in it right in the leg?

A. Before they took me to the hospital the only thing I could see was blood on my leg.

Q. You saw what?

A. Before I went to the hospital I got hurt on the leg, but I could not see good.

Q. How did it feel?

A. It hurt very, very much. It was hurt very much.

Q. How did you feel in the hospital, did it hurt you there?

A. Well, for 25 days it hurt very bad every day.

Q. For 25 days it hurt all the time?

A. Yes, sir, it did.

Q. Well, after you left the hospital you had a cast on, did you?

A. Yes, sir.

[fol. 38] Q. How long after you got out of the hospital was the cast taken off?

A. About three weeks.

Q. After they took the cast off, how did the leg feel; did it feel all right, or what?

A. The leg was stiff, it was sort of dead.

Q. Dead?

A. Yes, sir.

Q. How long after they took the cast off did you walk on it?

A. After three months I started to walk on it.

Q. And when you started, did you start right off or did you have to use a cane or a crutch or how did you get along?

A. When I started I had to have what do you call those things?

Q. Did you have to have crutches?

A. Yes, sir, crutches.

Q. How long did you have crutches?

A. About a month.

Q. That was right after they took the cast off, you used crutches for a month; is that right?

A. After they took the cast off I could not walk at all for three months, and then I walked with crutches for three months and then I had a cane.

Q. Well, how is your leg now? How does it feel?

A. When I walk it gets tired and when it is cold it hurts me.

Q. You mean when the weather is cold the leg hurts you?

A. Yes, sir, it does.

Q. Well, where does it hurt you?

A. Sometimes below the knee and sometimes right on the knee.

Q. But you get around now without any crutch or cane or anything; is that right?

A. I am walking without a crutch and without a cane.

Q. And you have done some work since the accident, haven't you?

A. I went down to the dock at Hoboken to work on those Munson Line ships.

Q. Did you work for the Munson Line on a boat?

A. I was feeling bad so I was putting brick in a bag, I [fol. 39] was sitting down putting the brick in bags.

Q. And this work that you did there, did you do it sitting down or did you have to run around?

A. I was sitting down, like I am now.

Q. Did you do any other work besides putting brick in bags?

A. That is all that I did.

Q. And you started to work there about the latter part of March, 1928?

A. About the latter part of March, 1928.

Q. How long did you continue to work for the Munson Line?

A. Today I still got a job or I go to work there when I am able to work. Sometimes I get tired, and I cannot work at all.

Q. Well, when you started to work there in the latter part of March, did you work steady or did you work on and off?

A. Well, two or three or at the most four days a week.

Q. Why didn't you work steady?

A. Because I could not work. The leg gets very tired and it hurts me.

Q. What did they pay you over there on the Munson Lins?

A. 50 cents an hour.

Q. Now, answer me this question. At the time that you were working for the New York, New Haven & Hartford Railroad Company, what was your pay there, how much did you earn a week?

A. It depended on how many hours we worked. Maybe $24, $26, or $28 a week.

Q. A week?

A. Yes, sir.

Q. How long did you keep working after you started with the Munson Line in March, 1928?

A. About a month.

Q. How long were you away from there?

A. Well, last month I do not work.

Q. Well, why did you stop working?

A. Well now, when the warm weather come, the leg swells up and I cannot work because the leg swells up.

[fol. 40] Q. The leg swells up and you cannot work?

A. That's right.

Q. Well, how long since you have been working there?

A. Since the third of last month I do not work.

Q. That is June?

A. From June until now.

Q. How long have you been away from there—not working there?

A. As I say, from June until now.

Q. Well, how have you been feeling since last June. How has the leg been feeling?

A. Pretty good if I do not walk much, but as soon as I walk on it or have to do something with it the leg gets tired.

Mr. Sansone: That is all.

Cross-examination by Mr. Brumley:

Q. Mr. Nogueria, when you started down the gangplank there was a man alongside of you, wasn't there, on the day of the accident, I mean?

A. The gang was with me.

Q. But when you started down the gangplank with the truck, there was a man alongside of you holding on to the handle on the right side, wasn't there?

A. There was four men on the back and another one at the handle with me?

Q. And were you between the two handles?

A. Yes, sir.

Q. And this other man that had his hand holding one of the handles?

A. Yes, he was there.

Q. Well, was he there to your right?

A. He was in back of me.

Q. You mean the other man that had ahold of the handle was also between the two handles?

A. I was the only one between the two handles, the other man was in back of me.

Q. But he had a hold of one of the handles, didn't he?

A. That was the hook and I was with the handle.

[fol. 41] Q. Just listen to this question, will you, please. When you started down the gangplank wasn't there another man alongside of you holding on to one of the handles of the hand truck?

A. There was four on the back and I was in the middle between the handles and one was on the right of me.

Q. That man that was at the right of you had a hold of one of the handles, is that right?

A. He was holding one of those handles.

Q. Now, that man that was to the right of you went all the way down the gangplank, didn't he?

A. I was the only man that went down with the truck.

Q. You mean you were the only man that went down with the truck?

A. Yes, sir, I was the only man.

Q. You are sure about that, are you?

A. I am positive.

Q. Well, what became of the man that had ahold of the handle?

A. I don't know; those fellows were there working with me. There was negroes and two or three men.

Q. Now as I understand, there were four men on the rear of the truck near the pier, on top of the plank, who had hooks and who stuck those hooks in the bales, is that right?

A. Yes, but they did not stick them in good.

Q. But they stuck those hooks in the bales, is that right?

A. Yes, sir.

Q. Now you saw them do that, did you?

A. I saw that.

Q. And then after that you started down the plank, is that right?

A. I went down.

Q. Yes or no?

A. Yes, sir.

Q. After that you started down the plank, is that right?

A. Yes, sir.

[fol. 42] Q. And your back was to the four men in the rear, is that right?

A. Yes.

Q. And you had ahold of the handles all the way down the plank, yes or no?

A. I have to go down. I could not hold it.

Q. Didn't you say in answer to your last question that you had ahold of the handles of the truck all the time you were going down the plank until you got to the float?

A. Yes, sir, the handles were up like that and I went down until I get down I could not leave the handles alone. The handles were like that (indicating).

Mr. Sansone: May we have the record indicate that the interpreter holds his hand up.

The Court: Let the record so indicate.

Recess until 2:00 P. M.

Afternoon Session

Victorio Nogueira resumed the stand:

Cross-examination by Mr. Brumley (cont'd):

Q. Mr. Nogueira, are you sure there was no guide rail on the sides of this plank?

A. Yes, sir, I am.

Q. Do you know, or don't you remember that on this plank, as on the other plank there was a rail about three inches high on each side?

A. All the time, they have rails on the other planks, but not on that day.

Q. Are you sure about that?

A. Yes, sir.

Q. You didn't measure this plank of course at any time?

A. No, sir.

Q. I think you estimated that the plank was about as long as this table (indicating counsel table); is that right? [fol. 43] A. About that long, a little more wider.

Q. Would you be willing to say that the plank was not as long as—well, say 18 feet?

A. I don't know for sure how many feet it is. I think it is about that long.

Q. Did this plank run from the dock to the float or did it run from the dock to the floor of a car?

A. It went from the dock to the float.

Q. Well, did the plank go into the car?

A. It goes from the dock, right alongside the float.

Q. Well, did the plank go into the car, yes or no?

A. It goes to the middle of the float, not into the car.

Q. Now, when you fell down you were on the floor of the float, is that right?

A. Right on the float.

Q. And what hit you?

A. The hand truck and the bale of paper goes over on my leg.

Q. You say that both the paper and the hand truck hit you?

A. Yes, sir.

Q. Was the bale on the hand truck when it hit you?

A. It was half and half. Half into the truck and half on to the floor of the float.

Q. And you were knocked down?

A. Yes, sir.

Q. Did you become unconscious?

A. I was falling on top of the rail, and the hand truck and the bale of paper they came over on my leg.

Q. I will ask you again. Did you lose your consciousness, did you pass out, did you forget where you were?

A. I just lay.

Q. Just a little do you mean?

A. I just lay a little out of my senses.

Q. Do you know who picked you up or helped you?
A. It was a colored fellow and another Spanish fellow.
Q. Now, in March you did some work, did you?
A. Yes, sir.
[fol. 44] Q. And did you work over in Hoboken at that time?
A. Yes, sir.
Q. That was for the Munson Line, is that right?
A. Yes, sir.
Q. And that was sweeping vessels, was it?
A. Yes, sir.
Q. And since March 1928 up until June the 3rd of this year, you have worked off and on, is that right?
A. Yes, sir.
Q. And was it all the time for the Munson Line?
A. Yes, sir.

Mr. Brumley: That is all.

Redirect examination by Mr. Sansone:

Q. When you fell down, Mr. Nogueira, and the truck and the paper went on you while you were lying there could you see the truck and the paper on you?
A. Yes, sir.
Q. You knew where you were and what was going on?

Colloquy Between Court and Counsel

Mr. Brumley: I object to the question.
The Court: Objection overruled.
Mr. Brumley: Exception.
The Witness: Yes, sir.
Mr. Sansone: That is all.
The Court: I will hear your motion now, Mr. Brumley.
Mr. Brumley: This argument will be an open motion; is that right, your Honor.
The Court: I will hear your argument upon motion.
Mr. Brumley: If your Honor please, I call your attention to the testimony that this accident happened on the floor of the float itself, and I think it cannot be denied that therefore the accident happened upon navigable waters in the [fol. 45] East River, at Pier 42, and I don't think it makes

any difference whether it happened on the gangplank or on the plank from the dock to the float or on the float itself. In either case it would be on navigable waters.

Regarding court decisions on this subject, I would like to call your Honor's attention to the opinion No. 29, on January 20th, 1928, approved by the United States Employees' Compensation Commission, Washington, D. C., particularly to that paragraph on page 43, which states in substance what I am contending here (hands court printed opinion).

The Court: Just what is your point?

Mr. Brumley: My point is, your Honor, that effective July 1, 1927, there was an act to provide compensation, a federal act, for disability or death resulting from injury to employees in certain maritime employment, and that under that section, under Subdivision A of that section, of that act, it is provided that compensation shall be payable under this act in respect to disability or death of an employee, but only if the disability or death results from injury occurring on navigable waters of the United States, including drydock, and for recovery for disability or death, to the workmen's compensation proceedings, for an amount provided by the law, and then it provides for other things such as cases when the compensation shall not be payable covering crews of vessels.

And section 4 provides for liability for compensation. Section 5 says this: "Liability of an employer described [fol. 46] in section 4, shall be exclusive of any place, and all other liability of such employer to employee," as legal representative, husband, wife, next of kin or anyone else entitled to recover damages from such employer, at law or in admiralty, on account of such injury or death.

Now that, if your Honor pleases, expressly makes the compensation act, effective July 1st, 1927, exclusive. We have here the Federal Employers' Liability Act of 1908, amended 1910. We have Congress passing on it since last year, this Employers' Liability Act of 1908 and then Congress passed this last year this Longshoremen's Compensation Act, and it expressly says it is exclusive of all remedies in law or in admiralty, but that it is only applicable, it is applicable to places arising on navigable waters such as cases involving crews of ships, so that here, as I under-

stand it, is a clear case for the application of this act to the exclusion of the Federal Employers' Liability Act. The fact that this man is an employee of a railroad company, of course, does not give him any remedy under the federal act by this later enactment, and we find that his remedy is solely by way of compensation.

The Court: Is that as to 1908?

Mr. Brumley: The federal act passed in 1908 and this act became effective in 1927, July 1st.

The Court: In July, 1927?

Mr. Brumley: Yes.

The Court: When did this accident occur?

[fol. 47] Mr. Brumley: In October, 1927, after seven months. Now it would be rather far-fetched, your Honor, to say that Congress did not have in mind the Federal Employers' Liability Act. It would be rather far-fetched to say that they did not mean what they say, when they say that it is exclusive of all other remedy at law or in admiralty.

Now the Compensation Commission in that opinion as passed upon, when they passed upon the question, they said that the right of an interstate commerce employee having a compensation under the Federal Liability Act, is enforcible at law.

Now I have not been able to find any decision on the point in a court decision, your Honor. Of course, this thing is all new, there has been no time for any authoritative ruling on the point.

We do know the attitude of the compensation commission in Washington and that their interpretation and entertaining jurisdiction in cases of this kind. We feel that their view is correct so far as this case is concerned, and that the remedy is by way of compensation and not under the Federal Employers' Liability Act.

Now, your Honor, there are of course a great many employees who do not come under the Federal Liability Act. There are a great many employees who do. It would seem to be that Congress has sought to provide compulsory compensation for employees of railroad companies and steamship companies. Employees who are engaged in so-called longshoring work, who are engaged in trucking to and from

[fol. 48] vessels, and who are engaged in working on vessels. They have partly occupied the station field taken by the Federal Liability Act. They have said, in so many words, that the Federal Liability Act is limited to the extent covered by this old law, and this compensation law, instead of saying that, they said at or any navigable waters of the United States.

By that I believe, your Honor, if this accident had happened on the dock, it would be another question. It did happen, I think without question on navigable waters on this float, which was in the water and in that event it eliminates the action in tort, whether it be an action in tort or an admiralty matter, it does not matter.

There is no question that Congress has a right to legislate. It has legislated and it goes to the very fundamentals of the subject. It has given the athority to the United States Employees' Compensation Commission at Washington, and an act of Congress cannot very well be twisted around. It is quite plain.

The Court: I will hear you, Mr. Sansone.

Mr. Sansone: Of course, your Honor, it is conceded by both sides that in this act there is no mention of the Federal Liability Act at all. Your Honor is well familiar with that act which was passed in 1908 and without exception the United States Supreme Court has held that in cases involving employees engaged in interstate commerce, that that act is exclusive and that it is the only remedy.

If we will just look into the history leading up to the passage of this act, why I think that it will clearly appear [fol. 49] that they could not have had in mind the employers' liability act or anything in that form.

If your Honor recalls, in 1917 Congress passed an amendment to the Judicial Code that a man engaged in maritime work, a common law action conferred jurisdiction on the federal court, and later, in 1922, an act was passed to overcome the obstacles and in which was expressly stated and which held that no compensation is applicable, and finally, in 1922, they passed a *a* statute which said that they could apply the compensation act to the various states, and when they went up in the case of Washington vs. Dawson, 276 U. S., where they attempted to argue for the payment of compensation according to the compensation

act of various states, why the Supreme Court says now you must have uniformity in maritime matters, if it can be done, and if Congress wants to pass a federal compensation act, they can do it, but they cannot make state compensation acts applicable to seamen.

Then we had the Jones Act of 1920, just to show what was in Congress's mind, the trend of the legislation was then.

In the Jones Act of 1920, which youh Honor is familiar with, in any action where a seaman is hurt, he shall have the benefit of the Federal Liability Act, and the fellow-servant rule applies. That was for the protection of a man working on the sea, and of course it did not cover longshoremen, in fact, the cases would hold that if a man was a seaman and a member of a crew, he came under the Jones Act with the protection of the comparative negli- [fol. 50] gence doctrine and the fellow servant rule, and he could recover.

That was the state of affairs until the Hunt case of 1925, in the October Term of the United States Supreme Court, held that a longshoreman engaged in doing work that a seaman used to do, that for the *the* purposes of the Jones Act, he was a seaman and it was fair for him to come under the same category, and after the Hafferty case, when the United States Supreme Court held that a longshoreman was a seaman, then this statute was passed to cover longshoremen and harbor worker employees.

Now we have this situation, if the contention of the defendant is to prevail here. In all cases under the Federal Liability Act, one disciplinary feature was that employees in railroad companies must have a uniform remedy and so it was that none of the States would legislate.

The United States Supreme Court has consistently held that where he is engaged in interstate comerce, that the States cannot interfere. Now if the defendant's contention is to prevail here, this situation develops, your Honor.

If a man is working on a dock, and this same man was working on a dock, loading this material on a hand truck. He loads this material and this material goes out of the State. He is engaged in handling interstate commerce. If he is hurt on the dock, his compensation comes under the Federal Liability Act, but if he is hurt on the float then

if the defendant's contention is to prevail here, if he takes it to the float, he must get compensation.

[fol. 51] When he is on the dock, his rights are defined by the Federal Liability Act. When he gets on the boat, he must take compensation.

We have a very remarkable situation developed, your Honor. Assuming that a string of cars, ten cars, say, let us assume that there is a string of ten cars being pushed on to this float. The man at the head end of the string of cars is being pushed ahead, and he is on the float, and he has compensation, and the man at the other end is still on the land and that is under the Employees' Liability Act, because the statute says he must be on navigable waters. Let us assume that a man is working on a car on a float. There is a defective coupling, a defective hand-hold gives way, anything that is covered under the Safety Appliance Act, and which says that if the railroad company does not give them a coupler that couples automatically or a hand-hold that is safe, those things which come under the Saf-ty Appliance Act.

Now I submit, your Honor, that Congress never intended to repeal that act which stood under fire in the United States Supreme Court for twenty years. Now let us assume, if their contention is to prevail. These acts were primarily passed for protection of men on the water. A member of the crew is protected in Congress by the Jones Act, and they were put into the same class as railroad employees, where contributory negligence did not bar, and where the fellow-servant rule was abolished they were put [fol. 52] into that class, and now under this act, that is the Jones Act, passed in 1920, they came under the Federal Liability Act, but because it says here if they are on navigable waters, it must be that the Federal Act is abolished. Now, your Honor, about the only thing in this statute which might give any color to the argument is that point in section 5, which says to recover damages from such employer, at law, or in admiralty, and it seems that they argue that at law you must read into that law under the Employees' Liability Act, or common law. Your Honor is familiar with cases where they proceeded in a common law cause of action and in maritime cases, maritime law, attort in federal courts, and when they refer to "at law" it is plain that

they intend to say to cover these kind of cases where longshoremen are to recover "at law or in admiralty."

If your Honor will turn to Section 37 of the Act it shows just what Congress had in mind I think.

You will see, your Honor, that they cannot work on a boat unless they have certified as to that. I submit, your Honor, that where Congress has passed a federal law, which has not in any way been questioned by the courts, I submit—as they say in the Knickerbocker Ice case vs. Stewart—and I submit that case to you now, your Honor, to read (handing Court printed opinion).

Now, your Honor having finished reading that, I simply say in closing, that I do not believe that they ever intended to so modify the federal act as to throw the employees of [fol. 53] railroad companies into a state of chaos. I submit that they never intended to do that, and there can be no such consideration put on it.

The Court: Is there anything in this record to show what kind of a boat it was. If you will notice, gentlemen, section 2, paragraph 3, provides "Any boat under 18 ton."

Mr. Sansone: There is nothing in the record now, your Honor.

The Court: That it does not disclose——

Mr. Brumley: The record just says a float upon the water, your Honor.

The Court: Is this float moved about from place to place by a tug?

Mr. Brumley: Yes.

The Court: Is it a large railroad float?

Mr. Brumley: It is a float on which are tracks, on which are cars and moved about the harbor from one place to another pulled by a tug.

The Court: And is pulled up alongside this pier with the cars on it to be loaded?

Mr. Brumley: Yes.

The Court: And then it was loaded by this gangplank from the dock up here on to the boat?

Mr. Sansone: Your Honor, they just pull these barges right up so that the trucks come down, and the track meet the cars, the tracks on the float and the tracks on the dock meet, and the cars go right on and off.

Mr. Brumley: I think, your Honor, that section 3 does not apply in this case in a way, because it more or less limits the crew of any vessel.

[fol. 54] The Court: It says it does not include any person engaged by any master to load or unload.

Mr. Brumley: It does not include the employee of a master of a vessel.

The Court: This, however, was the New York, New Haven & Hartford Railroad Company. It does not make much difference I do not believe whether they meant the master of a boat or the master of the New York, New Haven & Hartford Railroad Company. In this case you must take it as the master of the New York, New Haven & Hartford Railroad Company.

The record, however, does not show anything about ton nage and we cannot do anything on the motion at this time. The motion is temporarily denied, or rather, I will reserve decision on the motion.

Mr. Sansone: May I call another witness?

The Court: You may.

Dr. Roy Lee Blackman, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Sansone:

Q. Dr. Blackman, you are a duly authorized licensed practicing physician in the State of New York?

A. I am.

Q. How long?

A. Since 1914.

Q. And with what institutions are you connected?

A. The Ruptured and Crippled Hospital.

Q. In what capacity?

A. Assistant surgeon.

Q. Did you doctor a patient who appears as the plaintiff in this action, Victorio Nogueira?

A. I did.

[fol. 55] Q. Do you recall when?

A. In February, this year.

Q. Do you remember when in February?

A. I think on February 20th.

Q. Where?

A. At my office.

Q. Will you state what the nature of the examination was that you made, and what you found to be the matter with him?

A. His right leg was greatly swollen above the knee, and down the leg, including the ankle joint, with a bowing or turning outward just below the knee. The ankle was restricted about fifty per cent of normal in motion. That is, he indicated the extent of flexibility of the ankle was something around fifty per cent, and the knee was restricted about seventy-five per cent of normal. That is indicated in bending it back. There was a thickening about the knee joint with a callus formation, which is new bone, over the upper end of the large bone of the leg, at the knee joint, at the junction of the middle and upper thorid. Also a callus formation was felt over the tibia, which is the small bone on the outer side of the leg about two inches below the knee joint. The right leg which was the injured leg, measured one and one-half inches shorter than the left leg, and I took X-ray pictures that showed the multiple fracture.

Mr. Brumley: I object to that.

Q. Just a minute, doctor. Did you take X-rays yourself?

A. Yes, sir.

Q. And in your work since 1914, have you had occasion to take X-rays?

A. Yes, I have, thousands of them.

Q. I show you an X-ray, doctor, and I ask you if that is the X-ray that was taken by you of the plaintiff's leg?

A. Yes, it is.

[fol. 56] Mr. Sansone: I offer it in evidence.

Mr. Brumley: No objection.

X-ray marked Plaintiff's Exhibit No. 1.

Q. How many views did you take, doctor, of the plaintiff's leg?

A. Two.

Q. Taking the first, doctor, the first view (exhibiting X-ray photograph), the view on the left of the X-ray as shown there, will you tell us just what view that is?

A. That is the rear posterior view. That is taken directly through the front of the leg. There is a lateral view taken, with the leg sidewise, with the rays going through the side of the leg.

Q. Will you explain to us, doctor, the X-ray of the anterior posterior. Will you please tell us what that shows?

A. That shows a fracture through the upper end of the tibia which is the large bone, with the point of the fracture starting about two inches below the articulation of the knee. And this extends upwards into the knee joint itself.

Q. How far into the knee joint does that go?

A. It goes right into the articulating surface of the tibia, which is the knee joint. It also shows a fracture of the fibula, which is the small bone at this point, and an oblique fracture at the junction of the upper and middle part of the tibia, with a marked displacement of angulation of fragment. There is a callus formation shown around all three of these fractures.

Q. Now, can you describe to us the joint there where they have grown together, whether they have grown in that position, or is there some over-riding there?

A. The fracture extending into the joint is held in that position, but the fracture at the junction of the upper and the middle there is held with a marked over riding and angulation.

[fol. 57] Q. Doctor, how much do they overlap?

A. How much?

Q. Yes, doctor, how much do they overlap; can you tell us?

A. About an inch and a half, and also the fragment is displaced upwards, this being the upper end of the lower fragment (indicating), and this being the lower and of the upper fragment (indicating).

Q. So instead of the bones growing right together, where they were originally, they have grown together side by side; is that right?

A. Yes, sir.

Q. Then the bone is not the same as it was originally?

A. Well, the bone originally was much smaller than at the present time, or at the time the X-ray picture was taken, but that is due to the large amount of callus formation thrown out around this fracture.

Q. Confining yourself to the X-ray taken laterally, will you point out to us what that represents?

A. This shows the same fracture at this point, extending up to the knee joint, also shows the fracture of the fibula with the angulation. It also shows the fracture of the tibia with the posterior and lateral angulation. This bone (indicating) should come down in a straight line, but it comes down that way (indicating), and then over this way (indicating).

Q. Doctor, what effect has an injury, such as he sustained, and as shown by the X-ray—what effect does that have upon the plaintiff's ability to work?

A. Such a condition would cause pain and also throw all the weight of the body out of line and puts a stain on the knee jont. This large amount of callus and angulation and deformation interferes with the circulation, and causes the leg to swell.

Q. What effect regarding a limp?

A. It would cause him to limp and cause him pain.

[fol. 58] Q. It would be sufficient cause for limping and shortening?

A. Yes, it would.

Q. Now you treated him for some time, did you, doctor?

A. He came to me, came to my office twice a week, for seven visits.

Q. What was the nature of the treatment?

A. Baking and massaging and ligature treatments.

Q. What was that for?

A. Try and limber up the joint and increase the circulation and relieve the pain.

Q. Did the knee limber up?

A. Somewhat, yes.

Q. So while it was about 75 per cent loss of motion, when you first saw him there was some change?

A. It was 50 per cent when I last saw him.

Q. Indicating that the treatment had been beneficial?

A. Yes, sir, it improved the motion and the pain.

Q. Can you tell us doctor, whether or not this limp that he has now, whether that will be permanent?

A. He will have to limp due to the shortening, that is permanent.

Q. Can you give us any idea how long this knee will become inflamed when he walks?

A. Every time he puts extra strain on the knee it will swell. I can't say how long; for several years anyhow.

Q. You say that the condition that you found, that would be a competent and producing cause for discomfort there?

A. Yes, sir, pain and swelling.

Q. Would a man, being thrown down, and struck by a hand truck, weighing some 300 or 400 pounds, and falling on it, and having the bottom of the leg raised on a rail, would such an accident be a competent producing cause for the condition that you found?

A. Yes, sir, it would.

Mr. Sansome: That is all.

[fol. 59] Cross-examination by Mr. Brumley:

Q. Doctor, of course the pain that you describe is purely subjective, there is nothing that you can see or tell of your own knowledge?

A. Well, the swelling and loss of motion would cause pain.

Q. Pain itself is something that he has to tell you about, isn't it?

A. He has to tell me about it, but I know he has pain due to the swelling.

Q. There is nothing that you can see or feel or hear?

A. No.

Q. When did you make your first examination, doctor?

A. February 20th, of this year.

Q. When was the last time that you saw him?

A. Well he came to my office twice a week for seven visits, that is about four weeks later.

Q. That is, from February the 20th to some time in March you treated him, is that right?

A. Yes, sir.

Q. You have not seen him since March to examine him, have you?

A. No, I have not.

Q. And had you finished your treatment of massaging and baking?

A. I told him to continue it, but he stopped coming.

Q. And while he was under your care, I believe you said you noticed a considerable improvement?

A. In motion only.

Q. You also said you thought there was less pain?

A. Yes, I would say he had less pain.

Q. Now, when you examined him on February 20th, of this year did you see how much restriction there was, and doctor, did you say how much you found?

A. I found 75 per cent loss of motion in the knee joint.

Q. In flexion?

A. Yes, sir.

Q. Will you just show us about how far he could flex his [fol. 60] right leg. Use your own leg for an illustration, doctor?

A. About like I have it now (illustrating). Half way between full extenion and the right angle. Right about in that position (indicating).

Q. After you had given him seven treatments, how far could he—I mean, to a right angle?

A. Like this (indicating).

Q. So that after seven treatments he could flex it down to a right angle?

A. Yes.

Q. You don't suppose you know what flexion he has at the present time?

A. I do not know.

Q. How did you measure for shortening of the leg?

A. With a steel tape from the spine on one side, to the ankle, and from the other side to the ankle.

Q. Was he standing up or lying down?

A. Lying down.

Q. Did you make more than one check?

A. I measured each way twice, marking each point with a pen.

Q. And you estimated that it was an inch and a half?

A. It was not my estimation, it was my finding.

Q. You found that it was an inch and a half?

A. Yes, sir.

Q. It is true, doctor, isn't it, that of course an individual can have a difference in the length of their legs?

A. They are not normal if they have.

Q. Isn't there a degree of normality?

A. There are some people that have a slight shortening of one leg, and that is usually traced to some disease.

Q. And when this occurs to the extent of half an inch sometimes it is almost unnoticeable, isn't it?

A. Yes, sir.

Q. And the individual himself compensates for that, doesn't he?

A. Yes, sir.

[fol. 61] Q. And in addition to the individual compensation, you can make mechanical compensation for shortening by raising the heel of the shoe?

A. Yes, sir.

Q. And with the raising of the heel of a shoe there would be no necessity of a man having to limp?

A. Are you talking about this case?

Q. Any case?

A. I cannot answer about any case. I believe this man would have to limp even with the heel raised.

Q. If the heel was raised to the proper amount to correspond with the length of the other leg, it would tend a great deal to compensate for shortening?

A. Not so much for the limp.

Q. It would tend to compensate for the shortening, wouldn't it?

A. Yes, sir.

Q. Now, when you examined him in February, did you find that the knee was swollen at all?

A. Yes, I testified to that. There was a marked swelling and also in the ankle.

Q. Do you know how much swelling there was of the knee, over and above the left knee?

A. Never so you could see it.

Q. That swelling was what you might call in outline. It was a general swelling of the knee?

A. It was a general swelling of the knee, the leg, and the ankle.

Q. Did you notice after seven treatments,—was there a swelling, or had it decreased somewhat?

A. The swelling had decreased.

Q. It had decreased somewhat?

A. Yes, sir.

Q. Well, did you take any measurements at that time, doctor?

A. I did not.

Q. You did not?

A. No.

Q. You have not noticed any swelling at the present time, or whether there is any?

A. No, I have not noticed.

[fol. 62] Q. Now, I think you said on direct examination, doctor, that the fibula fracture up, or near the knee, had united the fragments.

A. No, I was talking about the tibia. The tibia has a opposition fracture at the upper end, or here (indicating). It is not the fibula.

Q. And both in the fibula and tibia, below the knee, there is some callus formation?

A. Yes, sir. There is callus formation on all points of the fracture.

Q. And that callus formation indicates a union?

A. Yes, sir, very muc'

Q. What would you say as to the condition—I withdraw the question. What would you say as to the circulation of the leg at the time you had given him seven treatments, after completing the treament?

A. Well, the swelling subsided.

Q. Well, was the circulation improved?

A. Well, if the swelling subsided, that proves that circulation had been improved.

Q. So there was an improved condition in the circulation?

A. Yes, sir.

Q. You are sure of that?

A. Yes.

Q. Did you know that he was doing any work when he was under your care?

A. I don't think so. He came to my office in the middle of the day between one and three. He was not working at that time, at least, he was not in working clothes.

Q. But you really don't know whether he was working or not, do you?

A. No.

Q. Well, when he first came to you in February, was he using his cane?

A. Yes, he was. I believe he was using a crutch in the first visit.

Q. So during the course of the treatment by you, he changed from a crutch to a cane?

A. Yes.

Q. At the end of the seventh treatment, had he discarded the cane?

A. No, he still had the cane.

[fol. 63] Q. Now, did you notice the condition of the muscles of his leg, doctor, when he first came to you?

A. There was no particular way to tell about the muscles. There was so much swelling that you could not tell the condition.

Q. You could not tell anything of the condition of the muscles at all?

A. Well, there was no athophy.

Q. You say there was no atrophy?

A. No.

Q. Well, you knew of course the leg had been in a plaster cast for some time?

A. Yes.

Q. And you know, don't you, doctor, that after—I will withdraw that question. Now, doctor, was there any atrophy?

A. There was no atrophy of the muscles.

Q. Well now, you know, doctor, that after a leg has been in a plaster cast there is an atrophy, don't you?

A. Immediately after, not seven weeks later.

Q. Well now, doesn't that atrophy condition continue after the cast has been taken off for some time?

A. Sometimes yes and sometimes no. It is a question if it would or not.

Q. Do you know how long the cast was on?

A. He told me seven weeks.

Q. That would cause considerable atrophy of the muscles, wouldn't it, doctor?

A. Yes. But he did not have it at the time that he came to me because it was some time after the cast had been removed.

Q. But the muscles go back to normal later on, don't they, doctor?

A. Yes.

Q. And in order for them to get back to normal they would have to be used, these muscles would have to be used?

A. Yes, sir.

Q. And atrophy would continue for some time after the usage began?

A. Yes, sir.

[fol. 64] Q. And when you saw him you did not notice any atrophy of the muscles of the leg, that is February 20th?

A. There was too much swelling and I could not say as to whether or not there was atrophy.

Q. You did say there was not?

A. Yes.

Q. So when you say that you mean the muscles above the knee as well as below, don't you, doctor?

A. Yes, the thigh and leg muscles.

Q. You saw no atrophy either above or below the knee?

A. No, I did not.

Q. Have you noticed Mr. Nogueira's shoes?

A. No.

Q. Have you noticed whether they are symmetrical in the soles or not?

A. No.

Q. Now I suppose, doctor, that when you were referring to the knee motion, you were referring to the active motion of the knee, weren't you?

A. The motion made by the man himself.

Q. The motion made by the man himself that is the normal active motion of the knee?

A. Yes, sir.

Q. And did you try possibly to move the leg?

A. Yes, sir.

Q. And when you tried to flex the leg, how far back would it flex?

A. No more than the same distance.

Q. That was when you first saw him?

A. Yes, sir.

Q. So what would you say as to the condition of the ligaments of the leg when you first saw him?

A. That is very hard to tell in my opinion, but I believe that two ligaments were torn with that type of frac-

ture. I felt the leg, and they were the two most likely ligaments.

Q. Did you notice any flexibility in the lateral ligaments?

A. He had no lateral mobility in the knee joint.

[fol. 65] Q. Did you notice any weakness of the ligaments?

A. Any weakness?

Q. Yes.

A. You cannot determine that.

Q. Did you notice any atrophy in the knee?

A. No.

Q. And of course you don't know what care or attention he has received since he left you?

A. No.

Q. Did you find any water on the knee when you saw him, doctor?

A. No, sir.

Q. No signs of that at all?

A. No.

Mr. Brumley: That is all.

By Mr. Sansone:

Q. Doctor, how did you account for the swelling in the knee at the time?

A. Due to adhesions and circulation, loss of circulation about the knee joint, due to the fracture.

Mr. Sansone: That is all.

The Court: Any more questions, Mr. Brumley?

Mr. Brumley: No.

Mr. Sansone: The plaintiff rests.

Plaintiff rests.

Mr. Brumley: It is conceded, that if Captain Clark, the assistant master of the lighter of the defendant, testified as to the weight of the float, the float involved in this case, he would testify that it weighed 500 tons. The plaintiff, it is conceded, would call no testimony to dispute that.

Mr. Sansone: It is so conceded.

MOTION TO DISMISS

Mr. Brumley: If your Honor please, I now move to dismiss upon grounds before stated, and upon the further

[fol. 66] ground that the plaintiff failed to prove negligence on the part of the defendant and on the further ground that from the plaintiff's own story that he assumed risks of——

The Court: There is no question but what that is navigable water on the East River.

Mr. Sansone: The float was on navigable water.

The Court: Is there any question about it having been on these navigable waters and as to what occurs upon it?

Mr. Sansone: There is not. However, in 259 United States, there is a question where the accident happened upon a dock they held that it was not on navigable waters. The testimony here, your Honor, was that the men put their hooks into this bale while they were still on the dock.

The Court: I know what the facts are as well as you do. Mr. Sansone.

Mr. Sansone: I just wanted to call them to your attention, your Honor.

The Court: This injury arose upon a boat on navigable waters, a boat of more than 18 tonnage. The Compensation Act passed by Congress provides compensation for disability or death, and in view of the nature of this Compensation Act, I am thoroughly convinced that this Court has no jurisdiction, and that this man's remedy is one of application under that compensation act. Therefore the motion to dismiss is granted.

Mr. Sansone: I ask an exception, your Honor.

The Court: You may have an exception.

[fol. 67] In United States District Court

Stipulation re Transcript of Record

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, that the foregoing is the true transcript of the record of the United States District Court in the above-entitled case; that it contains all the evidence and all the exceptions of the plaintiff-appellant and of the defendant-respondent upon the trial; and that an order to that effect may be entered herein

permitting the plaintiff-appellant to file and settle the annexed bill of exceptions nunc pro tunc as of July 31, 1928.

Dated New York, November 19th, 1928.

Sansone & Gelb, Attorneys for the Plaintiff-Appellant. John M. Gibbons, Attorney for the Defendant-Respondent.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING AND FILING TRANSCRIPT OF RECORD

Upon the foregoing stipulation and consent of the attorneys for the respective parties herein, it is hereby

Ordered, that the foregoing is a correct bill of exceptions of the said District Court in the above-entitled case, containing all the evidence and all the exceptions of plaintiff-appellant and defendant-respondent, upon the trial, and that the same be filed as the settled bill of exceptions nunc pro tunc as of July 31, 1928.

Dated New York, November 19th, 1928.

Walter C. Lindley, Judge of the United States District Court.

[fol. 68] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

Now comes the plaintiff, Victorio Nogueira, by his attorneys, Sansone & Gelb, and says, that in the record and proceedings in the above-entitled cause, there is manifest error which occurred upon the trial of said cause and upon which it will rely in its prosecution of the appeal in the above-entitled cause in this, to wit:

1. That the Trial Court erred in granting defendant's motion to dismiss the complaint and to non-suit the plaintiff at the close of the plaintiff's case. In that connection the following proceedings were had, to wit:

"Mr. Brumley: If your Honor please, I now move to dismiss upon the grounds before stated, and upon the further ground that the plaintiff failed to prove negligence on

the part of the defendant and on the further ground that from the plaintiff's own story that he assumed risks of—

* * * * * * *

The Court: This injury arose upon a boat on navigable waters, a boat of more than 18 tonnage. The Compensation Act passed by Congress provides compensation for disability or death, and in view of the nature of this Compensation Act, I am thoroughly convinced that this Court has no jurisdiction, and that this man's remedy is one of application under that compensation act. Therefore the motion to dismiss is granted.

[fol. 69] Mr. Sansone: I ask an exception, your Honor.

The Court: You may have an exception.

Wherefore the said Victorio Nogueira, the plaintiff, prays that the judgment herein for the error and proceeding aforesaid, may be reversed and annulled and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment.

Dated N. Y., October 2nd, 1928.

Sansone & Gelb, Attorneys for Plaintiff. Office and P. O. address: 233 Broadway, Borough of Manhattan, City of New York.

[fol. 70] Citation, in usual form, omitted in printing.

[fol. 71] In United States District Court

Stipulation for Filing Printed Record

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, that the foregoing printed record be filed for use by the Clerk in lieu of the original papers, in certifying a record on appeal.

Dated November 19th, 1928.

Sansone & Geld, Attorneys for Plaintiff-Appellant.

John M. Gibbons, Attorneys, for Defendant-Respondent.

IN UNITED STATES DISTRICT COURT

ORDER FOR FILING PRINTED RECORD

Upon the above stipulation, it is

Ordered that the foregoing printed record be filed for use by the Clerk in lieu of the original papers, in certifying a record on appeal.

Dated November 19, 1928.

Walter C. Lindley, U. S. D. J.

[fol. 72] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1928

No. 245

Argued March 6, 1929. Decided April 15, 1929

VICTORIO NOGUEIRA, Plaintiff-Appellant,

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Chase, Circuit Judges

OPINION

Suit under the Federal Employers' Liability Act (45 U. S. C. A. c. 2, §§ 51-59) to recover for personal injuries sustained by plaintiff while loading interstate freight upon defendant's car float in the East River, New York City. At the close of plaintiff's evidence, the complaint was dismissed for lack of jurisdiction, on the ground that plaintiff's remedy must be sought under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat.

1424; 33 U. S. C. A. §§ 901-950). From a judgment for defendant for costs, plaintiff appeals. Affirmed.

Sansone & Gelb, of New York City (Sol Gelb, of New York City, of counsel), for appellant.

John M. Gibbons, of New York City (E. R. Brumley and E. J. Moore, both of New York City, and J. Howland Gardner, of New Haven, Conn., of counsel), for appellee.

SWAN, Circuit Judge:

The plaintiff was employed by the defendant to work as a freight handler upon its docks and car floats. On October 13, 1927, at the time of sustaining the injuries complained of, he was working as one of a gang of freight handlers in loading heavy bales of paper, destined for transportation in interestate commerce, onto a 500-ton car float moored at Pier 42, East River. His work consisted in placing a bale of paper upon a hand truck and drawing it some 15 feet along the dock, and thence down an inclined plank which led from the dock to the car float. In going down the plank, he was expected to have the assistance of several other members of the gang. He went in front of the truck, holding its handles, while other at the rear were supposed to fasten hand hooks into the bale and help retard its progress. Due to their negligence, as he contends, the truck got out of control and skidded down the inclined plank, throwing him to the floor of the car float and falling on top of him in such a way as to crush his leg.

We may assume, as have the parties, that prior to the enactment of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §§ 901-950) a finding by the jury of negligence would have established in favor of the plaintiff a cause of action under the Employers' Liability Act (45 U. S. C. A. §§ 51-59). See Erie R. R. Co. v. Jacobus, 221 F. 335 (C. C. A. 3); The Passaic, 204 F. 266 (C. C. A. 2); The Erie Lighter 108, 250 F. 490 (D. C. N. J.); Southern Pacific Co. v. Jensen, 244 U. S. 205, 213, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. The dispute is whether compensation under the later statute has not now been made the sole relief which plaintiff may obtain.

This act provides a compulsory system of compensation for disability or death resulting from injury (irrespective

of the employer's fault) to employees in certain maritime employments. The statute is long, and it will suffice to refer to certain of its provisions, which appear pertinent to [fol. 74] the present inquiry. Section 3 provides that compensation shall be payable in respect to disability or death of an employee, but only if the injury occurs on navigable waters of the United States, and if recovery may not validly be provided by state compensation laws. It also excepts from the act certain employees, including "a master or member of a crew of any vessel," and "any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." Employees of the above description are also expressly excluded from the definition of "employee" given in section 2(3). Section 4 declares that "every employer shall be liable for and shall secure [by insurance] the payment to his employees of the compensation payable under" later sections. Turning back to the definitional provisions (section 2), we find that "the term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." Section 5 relates to the exclusiveness of the compensation liability imposed by the act. It reads as follows:

"Sec. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death except that if an employer fails to secure payment of compensation as required by this act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

These express provisions make it clear that, if the plaintiff had a right to compensation under the act, this right was exclusive of all others.

If the plaintiff's employment was maritime, it can scarcely be doubted that the conditions specified in section 3 are met. He was loading a vessel of more than 18 tons register, and was not the master nor a member of the crew. His injury occurred upon navigable waters. It was one for which recovery could not validly be provided by a state compensation law, if his employment was maritime. Northern Coal & Dock Co. v. Strand, 278 U. S. 142, 49 S. Ct. 88, 73 L. Ed. —. There the coal company maintained a dock on Superior Bay, Wisconsin. It employed regularly some 18 men, who worked, as directed, upon the dock or upon vessels made fast thereto for unloading. Strand was one of those so employed. He was killed while on a vessel, assisting in the discharge of her cargo. A judgment by the state Supreme Court, sustaining an award to his widow under the state Compensation Act, was reversed. In the opinion of Mr. Justice McReynolds it is said:

"Strand's employment contemplated that he should labor both upon the land and the water. When killed he was doing longshore or stevedore work on a vessel lying in navigable waters, according to his undertaking. His employment, so far as it pertained to such work, was maritime; the tort was maritime, and the rights of the parties must be ascertained upon a consideration of the maritime law. Southern Pacific Co. v. Jensen, 244 U. S. 205, 217 [37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900]; Washington v. Dawson & Co., 264 U. S. 219 [44 S. Ct. 302, 68 L. Ed. 646]. * * * The unloading of a ship is not matter of purely local concern. It has direct relation to commerce and navigation, and uniform rules in respect thereto are essential. The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."

There is, of course, no distinction, in respect to the matter now under consideration, between unloading and loading a vessel. Newham v. Chile Exploration Co., 232 N. Y. 37, 133 N. E. 120, 25 A. L. R. 1018; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 61, 34 S. Ct. 733, 58 L. Ed. 1208,

51 L. R. A. (N. S.) 1157. These cases also tend strongly to prove that the plaintiff Nogueira, was engaged in maritime employment at the time of his injury. We have only to decide whether the fact that he was loading goods into cars on a car float makes his employment nonmaritime, whereas it would clearly have been maritime, had he been loading a barge or a lighter. The cars were to be carried [fol. 75] on the water after they were loaded. That later they will be pulled off and run on land would seem to furnish no more reason for a distinction than would the fact that goods loaded on a barge were later to be transshipped by rail. The statute expressly recognizes that the employment may be maritime only in part. We conclude that the employment was maritime, and that the defendant was liable for the payment of compensation as prescribed in section 4.

There remains to be considered the plaintiff's argument that the act was never intended to include railroad employees engaged in interstate commerce, because they already had a remedy under the Employers' Liability Act. The bill which resulted in the Longshoremen's and Harbor Workers' Compensation Act was reported by the Senate Judiciary Committee (Senate Report 973, 67 Cong. Rec. 10467), with a statement that its purpose was to provide for compensation, in the stead of liability, for a class of employees commonly known as longshoremen. For their protection congressional legislation was thought necessary, because of prior decisions by the Supreme Court. In Southern Pacific Co. v. Jensen, supra, it had been held that a stevedore employed by the Southern Pacific Company to unload one of its vessels, and injured thereon, was not entitled to compensation under the New York Workmen's Compensation Act (Consol. Laws, c. 67), because the state lacked power to legislate with respect to matters within the maritime jurisdiction of the United States. Congressional attempts (40 Stat. 395; 42 Stat. 634, 28 U. S. C. A. §§ 41(3), 371(3) by amendment of the Judicial Code to allow persons in maritime employment to claim rights and remedies under state compensation acts were held unconstitutional in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, and Washington v. Dawson & Co., 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646. These and numerous related decisions

have been carefully reviewed by the Supreme Court in its very recent decision of London Guarantee & Accident Co. v. Industrial Accident Commission, 278 U. S. —, 49 S. Ct. 296, 73 L. Ed. —, decided April 8, 1929.

In the meantime seamen had been given by the Jones Act (41 Stat. 1007 [46 U. S. C. A. § 688]) the remedies accorded to railway employees under the Employers' Liability Act. Panama R. R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; Engel v. Davenport, 271 U. S. 33, 46 S. Ct. 410, 70 L. Ed. 813. As a result the seamen were satisfied with their condition, and through their organized representative made known to Congress that they wished to remain outside the Longshoremen's and Harbor Workers' Compensation Act (68 Cong. Rec. 5908), and the bill as finally enacted excluded them. By the decision of International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157, stevedores had been held to be seamen within the meaning of the Jones Act. Consequently they also had the rights and remedies of railway employees engaged in interstate commerce. They, however, were not excepted from the Longshoremen's and Harbor Workers' Compensation Act. On the contrary by reason of section 5, their only right in respect to disability or death from injury occurring upon navigable waters is now the right to compensation conferred by the Act. Chernick v. Clyde S. S. Co., 248 N. Y. 508, 162 N. E. 504; Obrecht-Lynch Corp. v. Clark, 30 F. (2d) 144, 146 (D. C. Md.) semble.

In the light of this legislative history it would seem impossible to construe the statute (assuming that its language is not so clear as to forbid construction) so as to exclude freight handlers who work on railway car floats, without also excluding longshoremen who work on other types of vesels. Both classes are within the letter of the statute; both had other rights and remedies before its passage. It may be noted that, in extending this statute to the District of Columbia, Congress expressly excepted railroad employees from its operation. 45 Stat. 600, 33 U. S. C. A. § 901, note.

The plaintiff argues that this construction will bring about confusion and inconsistencies; that a brakeman or engineer, if injured on the float, will have one remedy, and, if injured on the dock, another. But, as pointed out

in Resigno v. F. Jarka Co., 248 N. Y. 225, 234, 162 N. E. 13, under the Haverty Case and State Industrial Comm. v. Nordenholt Corp., 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013, it was already common knowledge that the remedies available to a stevedore might vary from day to day, or even from hour to hour, and that a similar situation exists in the case of a railway employee, who gains or loses a remedy according to the particular service he is rendering at the very moment of his injury. Moreover, it does not follow that the mere locus of the accident [fol. 76] necessarily determines the right. A brakeman coupling cars upon a float, or an engineer driving his engine on a float bridge, may not be in maritime service just because he is over the water at the moment. See Cope v. Vallette Dry Dock Co., 16 F. 924, 925 (C. C. La.), aff'd, 119 U. S. 625, 7 S. Ct. 336, 30 L. Ed. 501. We do not say that he is not; we merely pass that problem until it shall arise.

Furthermore, adoption of the plaintiff's interpretation would drive us to the absurd result that a railroad employee loading intrastate freight upon a car float would also be excluded, and thus left without any statutory remedy. We conclude that railway employees employed in maritime employment cannot be excepted from the act.

The judgment is affirmed.

[fol. 77] In United States Circuit Court of Appeals, Second Circuit

Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges

Victorio Nogueira, Plaintiff-Appellant,

v.

New York, New Haven & Hartford Railroad Company, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed April 22, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for

the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 78] [File endorsement omitted.]

[fol. 79] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 80] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,379. U. S. Circuit Court of Appeals, Second Circuit. Term No. 248. Victorio Nogueria, petitioner, vs. The New York, New Haven & Hartford Railroad Company. Petition for writ of certiorari and exhibit thereto. Filed July 15, 1929. File No. 34,379.

FILE COPY

JUL 15 1929
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 248

VICTORIO NOGUEIRA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HUMPHREY J. LYNCH,
Counsel for Petitioner.

(34,379)